The Director of Central Intelligence
Washington, D.C. 20505

DCI 78-1986/2
Media

12 JUN 1978

Honorable Les Aspin
House of Representatives
Washington, D.C. 20515

Dear Les:

I read with interest your comment in the 29 May 1978 issue of Time that CIA should not be the only arbiter of what is and is not classified. My staff informs me that you may have been referring to the pre-publication process by which CIA reviews the manuscripts of employees and former employees who intend to publish articles or books on intelligence-related matters. Since my understanding of how this process works differs from that expressed in your comment, I would like to share that understanding with you.

As you know, such pre-publication reviews are authorized by the terms of the secrecy agreement which all employees are required to execute as a condition of employment. In the absence of such agreements the government's ability to deter and prevent the disclosure of classified information concerning intelligence and intelligence sources and methods would depend solely upon the applicability of the espionage statutes. Here, of course, the problem is that those criminal statutes do not clearly cover the publication of classified information and pre-publication disclosures. This is emphasized by the fact that, with the exception of the abortive Ellsberg trial, there has never been a prosecution for an unauthorized disclosure of classified information for the purpose of publication.

Under the current process of pre-publication review, once a manuscript is submitted to the Agency by an employee or former employee, it is reviewed by officials who have the knowledge and expertise to determine whether it contains classified information. If a determination is made that the manuscript contains classified information the individual will be advised that such information must be deleted. Depending upon the circumstances, the Agency might seek a temporary restraining order and a preliminary injunction if it has reason to believe the former employee will not abide by the Agency's decision. In such cases, or upon challenge by the individual, there would be judicial review of the Agency's decision that the ordered deletions contain classified information.

Judicial review in such cases today would be broader in scope than when the Agency first obtained judicial enforcement of the employee secrecy agreement in United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972). This is so primarily because of the Freedom of Information Act amendments of 1974, which became law subsequent to the Marchetti decision. As you may know, those amendments modified the exemption for classified information to require that the information be "in fact properly classified pursuant to...Executive Order." In addition, the 1974 amendments provided for judicial review "de novo" of decisions to withhold information from an FOIA requester.

In 1975, the former employee involved in U.S. v. Marchetti took the Agency to court over the 168 deletions the Agency had demanded in his proposed book. In Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir. 1975), the same court that decided Marchetti relied upon the 1974 FOIA amendments to hold that the Government, in order to sustain the deletions, had to show that the information contained therein was classified and continued to be classifiable. The court said that whether the information is classifiable is for the court to determine de novo, and a court may, in its discretion, examine agency records in camera to resolve the matter. As a result of Knopf v. Colby, in cases involving employee secrecy agreements, as well as in FOIA cases, the Agency must be prepared to convince a federal judge that the information it wishes to protect from public disclosure is properly and currently classified. Thus the Agency is not the only or final arbiter of what is or is not classified in these matters.

As you may know, the Agency is presently involved in further litigation over the enforceability of employee secrecy agreements. The agreements are based upon contract law, and we are in the process of determining in court whether we have a meaningful remedy if an individual subject to an agreement publishes a book without submitting it for review. If the court rules that we have no remedy, and that decision stands upon appeal, I would have no effective power to carry out my statutory charge to protect intelligence sources and methods in such cases. Regardless of the outcome in the current litigation, however, I would welcome the Congress to examine this matter with a view toward improving the government's ability to protect classified information.

I hope my views will be helpful and I would be glad to further discuss this with you.

Yours sincerely,

/s/ Stansfield Turner

STANSFIELD TURNER

OLC 78-1986
25 May 1978

AT MEMORANDUM FOR: [redacted]
Office of General Counsel

AT VIA : [redacted]
Acting Legislative Counsel

AT FROM : [redacted]
Assistant Legislative Counsel

SUBJECT : Representative Les Aspin's (D., Wis.) Statement Contained in 29 May 1978 Time Magazine "Off the Record" Section

AT 1. [redacted] On 25 May 1978 I called Loch Johnson, Staff Director, House Permanent Select Committee on Intelligence Subcommittee on Oversight, to ask him for enlightenment on the context within which Mr. Aspin made the following statement: "The CIA can't be the only arbiter of what is classified. There ought to be somebody you can appeal to -- an arbitrator set up by an act of Congress."

AT 2. [redacted] Mr. Johnson said that he had not read the article but that he presumed that the statement was made in context with Mr. William Colby's statement the preceding week during the "60 Minutes" TV program interview to the effect that it might be appropriate to have someone from outside of the CIA to pass on or review books by CIA former employees. Mr. Johnson further opined that Mr. Aspin's statement was not directed at the classification process per se; rather that his statement was in connection with the process that CIA follows in reviewing books written by current and former employees.

[redacted]

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78-1547

On the Record

Les Aspin, Congressman from Wisconsin: "The CIA can't be the only arbiter of what is or isn't classified. There ought to be somebody you can appeal to —an arbitrator set up by an act of Congress."

23 MAY 1978

Tony —

Pls prepare extract of my testimony to Biden & polite letter "Dear Les" on this

Stan